Criminal Law Note

Defense Attempts to Draw the Sting May Sting the Defense on Appeal

Introduction

Good trial advocates know that one of the fundamental rules of trial is to establish and maintain credibility with the trier of fact. In almost every case there is likely to be some unfavorable information about your client, the conduct of the investigation, or a key witness that could damage your case. To maintain credibility with the fact finder, good advocates often bring unfavorable information out about their case or client before the opposing party has a chance. By "drawing the sting" with these preemptive tactics, counsel has more control of the information, and he shows the fact finder that he has nothing to hide.

A recent Supreme Court holding[1] cautions defense counsel that there is a danger with these preemptive tactics. If the defense objected to the admissibility of the unfavorable evidence at trial and lost, and then introduced the unfavorable evidence preemptively, they likely waive any objection on appeal.

Facts

In *Ohler v. United States*,[2] the accused drove a van carrying approximately eighty-one pounds of marijuana from Mexico to California. A U.S. customs agent at the border searched the van and discovered the drugs. Maria Ohler was charged with importation of marijuana and possession of marijuana with the intent to distribute.[3] Before trial the government moved *in limine* to admit Ohler's 1993 felony conviction for possession of methamphetamine. The government wanted to admit this evidence under Federal Rule of Evidence (FRE) 404(b)[4] as character evidence, and under FRE 609 (a)(1)[5] as impeachment evidence.[6]

The trial judge did not allow this evidence under FRE 404(b), but ruled that if the accused testified, the government could impeach her with her prior conviction under FRE 609(a)(1).[7] In spite of this ruling, the accused testified in her own defense and denied any knowledge of the eighty-one pounds of marijuana found in the van she was driving. To lessen the anticipated impact of the government's cross-examination, the accused on direct examination also admitted to the previous felony conviction.[8] The accused was convicted and sentenced to thirty months in prison.[9]

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1. Ohler v. United States, 120 S. Ct. 1851 (2000).

2. *Id*.

3. *Id*. at 1852.

4. FED. R. EVID. 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This rule specifically prohibits the government from using uncharged misconduct or other bad acts to show the accused's character. *Id.*

5. FED. R. EVID. 609(a). Rule 609(a)(1) provides:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

Note that the balancing test for admitting a prior felony conviction against an accused is different and more stringent than the Rule 403 balancing test used for other witnesses. *Id*.

6. *Ohler*, 120 S. Ct. at 1852.

7. *Id*.

8. *Id.*

9. *Id*.

The defense appealed the conviction, claiming that the trial court's *in limine* ruling allowing the government to impeach her with the prior conviction was in error.[10] The Ninth Circuit did not address the substance of the accused's complaint. Instead the court ruled that because it was the defense that introduced the evidence of the prior conviction during direct examination, they waived the right to appeal the trial judge's *in limine* ruling.[11] The Supreme Court granted certiorari[12] to resolve a conflict among the circuits on this issue.[13]

Discussion

In a five to four decision, the Court affirmed the Ninth Circuit's ruling and held that a defendant who preemptively introduces evidence of a prior conviction on direct examination, may not claim on appeal that the admission of the evidence was erroneous.[14] The accused argued before the Court that FRE 103 and 609 create an exception to the general rule that a party who introduces evidence cannot complain on appeal that the evidence was erroneously admitted. The Court rejected this argument out of hand. The Court noted that FRE 103 simply requires the party to make a timely objection to an evidentiary ruling but is silent on when a party waives an objection.[15] Likewise, FRE 609 authorizes the defense to elicit the prior conviction on direct examination but makes no mention of waiver.[16]

The majority was equally unsympathetic to the accused's argument that it would be unfair to apply waiver in this situation. The accused contended that the waiver rule would force them to either forego the preemptive strike and appear to the jury to be less credible, or make a preemptive strike and lose the opportunity to appeal.[17] The Court responded by noting that this is just one of the many difficult tactical decisions that trial practitioners are faced with. The accused's decision to testify brings with it any number of potential risks. These risks include the possibility of impeachment with a prior conviction. The Court pointed out that the government must also balance the decision to cross-examine with a prior conviction against the danger that an appellate court will rule that such impeachment was reversible error.[18]

The Court was unwilling to let the accused "have her cake and eat it too" by short circuiting the normal trial process. According to the Court, such an outcome would deny the government its usual right to decide, after the accused testifies, whether to use her prior conviction.[19] This outcome would also run counter to the Court's earlier holding on a similar issue in *Luce v. United States*.[20]

Finally, the accused contended that the waiver rule unconstitutionally burdens her right to testify. The Court held that while the threat of the government's cross-examination may deter a defendant from testifying, it does not prevent her from taking the stand. "It is not inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify."[21]

Justice Souter led the four justice dissent. He wrote that the majority's reliance on *Luce* was misplaced. The holding in *Luce* was based on the practical realities of appellate review. Because the accused never testified, the appellate court could not know why. Further, the appellate court could never compare the actual trial with the one that might have occurred if the accused had taken the stand.[22] According to the dissent, *Ohler* is different because it was very clearly on the record that the only reason the defense impeached their own client was because of the judge's in limine ruling. An appellate court will

10. United States v. Ohler, 169 F.3d 1200, 1201 (9th Cir. 1999).

11. *Id*. at 1203.

12. Ohler v. United States, 120 S. Ct. 370 (1999).

13. The Eighth and Ninth Circuits follow the waiver rule. The Fifth Circuit held that appellate review was still available even after the preemptive questioning. *Ohler*, 120 S. Ct. at 1852-53.

14. *Id*. at 1855.

15. *Id*. at 1853

16. *Id*.

17. *Id*.

18. *Id*. at 1854.

19. *Id*.

20. 469 U.S. 38 (1984). In *Luce*, the Court held that a criminal defendant who did not take the stand could not appeal an *in limine* ruling to admit prior convictions under FRE 609(a).

21. *Ohler*, 120 S. Ct. at 1855 (citing McGautha v. California, 402 U.S. 183, 215 (1971)).

22. *Id*. at 1855 (Souter, J., dissenting).

have no difficulty in conducting a harmless error analysis based on this record.[23]

The dissent also attacked the majority's common sense rationale for their decision. According to the dissent, this is one exception to the general rule that a party cannot object to their own evidence.[24] In a rare reference to FRE 102,[25] Justice Souter said that allowing the accused to initiate preemptive questioning and still preserve the issue on appeal promotes the fairness of the trial while fully satisfying the purposes of FRE 609.

Advice

The majority opinion in *Ohler* is an important warning for defense counsel. It means that counsel will have to consider even more carefully the consequences of advising their clients whether to testify. Are the benefits of taking the stand outweighed by the risk of possible impeachment with prior convictions? If so, is it better for the defense to at least lessen the blow by eliciting the incriminating evidence on direct examination and forfeit the opportunity to appeal the judge's decision to allow the impeachment? These are difficult questions and the answer will obviously vary according to the particular circumstances of each case. The point for defense counsel is that he must fully appreciate what is at stake before deciding to "draw the sting."

While the opinion is limited to the context of impeachment with a prior conviction, the majority's rationale can apply to other forms of impeachment and other situations where the defense may want to engage in preemptive questioning of their own client or other defense witnesses to defuse potentially harmful evidence. Here again, defense counsel should be very cautious and make the decision only after fully considering all of the potential consequences. Major Hansen.

Legal Assistance Notes

Sometimes, It *Doesn't* Take a Village

The Supreme Court Knocks Down Washington Law Allowing Courts to Order Visitation Rights for Grandparents and "Others"

Arguably one good thing about having grandchildren is being able to visit them, spoil them, and then return them to their parents. However, returning them is no longer an option for a growing number of grandparents. Although many children are raised in traditional, two parent families, a growing number of children live in single parent families. Single parent families are more likely to depend on help from third parties. As a result, some grandparents play a larger and larger role in the lives and upbringing of their grandchildren. In recognition of this role, and in attempting to protect it, every state now has some form of grandparent visitation law.[26]

These laws typically allow grandparents visitation privileges with their grandchildren in the event of the parents' divorce, the death of one parent, or other similar happenings. However, Washington went further than most states and allowed any person, regardless of their relationship to the child, to petition for visitation rights. Although Washington's statute received much attention before being held unconstitutional by the Supreme Court in *Troxel v. Granville*,[27] its overly broad construction made it an aberration. Grandparent, and in some cases, third party, visitation (provided the third parties have a legitimate interest in the child) is here to stay, and legal assistance attorneys must advise their clients accordingly. One benefit of *Troxel* may be a renewed emphasis on parental determinations, while nonparents seeking visitation may face a taller hurdle to show that allowing visitation is in the best interests of the child.

At issue in *Troxel* was a Washington state statute[28] providing that "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest whether or not there has been any change of circumstances."[29] Petitioners were the paternal grandparents of two children who petitioned the Washington Superior Court for the right to visit their grandchildren.[30]

The facts behind the petition are as follows: Petitioners' son, Brad Troxel, had a relationship with Tommie Granville (hereinafter respondent) that lasted several years and produced

23. *Id*. at 1855-56 (Souter, J., dissenting).

24. *Id*. at 1856 (Souter, J., dissenting).

25. FED. R. EVID. 102. Rule 102 provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

26. Troxel v. Granville, 120 S. Ct. 2054 (2000).

27. *Id.*

28. WASH. REV. CODE ANN. § 26.10.160(3) (2000).

29. *Id.*

30. *Troxel*, 120 S. Ct. at 2054.

two children.[31] During that relationship and for several years after it ended in 1991, petitioners saw their grandchildren on a regular basis.[32] Brad Troxel committed suicide in May 1993.[33] Although the petitioners continued seeing their grandchildren regularly after their son's death, respondent told them in October 1993 that she wanted to limit their visitation with her children to one short visit each month.[34]

The grandparents petitioned for visitation in December 1993, seeking two weekends of overnight visitation each month as well as two weeks during the summer.[35] The respondent did not oppose visitation altogether, but asked the court to order one visitation day each month with no overnight stay.[36] The court issued a compromise ruling, ordering one weekend of visitation each month, one week during the summer, and four hours on each of the grandparents birthdays.[37]

Responent appealed, and the Washington Court of Appeals reversed, holding that nonparents lacked standing to seek visitation under the statute unless a custody action is pending.[38] Petitioners then appealed to the Washington Supreme Court, which affirmed the decision, but for different reasons.[39] The state supreme court based its decision on two grounds—that the statute was too broad and that the U.S. Constitution allows states to interfere with a parent's child rearing only to prevent harm or potential harm to the child. The court stated that "[i]t is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision."[40] The court also held that "parents have the right to limit visitation of their children with third persons," and that between parents and judges, "parents should be the ones to choose whether to expose their children to certain people or ideas."[41]

The United States Supreme Court granted certiorari to decide whether the Washington statute, as applied to the respondent and her family, violated the U.S. Constitution. The majority opinion discussed at length the parents' interest in raising their children, stating that "the liberty interest at issue in this case—the interests of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[42] The Court relied upon its extensive precedent in holding that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amend-

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31. *Id*. at 2057. Brad Troxel and Tommie Granville never married, but did have two daughters, Natalie and Isabelle.

32. *Id*.

33. *Id*.

34. *Id*. (citing *In re Smith*, 969 P.2d 21, 23-24 (1998); *In re Troxel*, 940 P.2d 698, 698-99 (1997)).

35. *Id*.

36. *Id*. at 2058.

37. *Id*. The court initially issued an oral ruling . After the respondent appealed but before it would address the merits of the appeal, the Washington Court of Appeals remanded the case to the Superior Court for entry of written findings of fact and conclusions of law. On remand, the Superior Court found that visitation was in the children's best interests, stating:

> The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music.
>
> . . . The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefited from spending quality time with the Petitioners, provided that that time is balanced with time with the children's [sic] nuclear family. The court finds that the childrens' [sic] best interests are served by spending time with their mother and stepfather's other six children." *Id.*

Moreover, following her appeal, respondent married Kelly Wynn, who formally adopted the two children approximately nine months after the Superior Court issued its order on remand. *Id.*

38. *Id*. Specifically, the court of appeals held that the limitation on nonparental visitation actions was "consistent with the constitutional restrictions on state interference with parents fundamental liberty interest in the care, custody, and management of their children." *Id.* (citing *In re Troxel*, 940 P.2d at 700).

39. *Id*. The Washington Supreme Court disagreed with the court of appeals decision on the statutory issue and found that the plain language of the statute gave the petitioners standing to seek visitation, regardless of whether a custody action was pending. However, the court agreed with the court of appeals ultimate conclusion, that the petitioners could not obtain visitation with the children pursuant to the statute. *Id.*

40. *Id*. at 2059 (citing *In re Smith*, 969 P.2d at 31).

41. *Id*.

42. *Id*. at 2060 (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923)).

ment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children."[43]

With that precedent in mind, the Court found that the Washington statute unconstitutionally infringed upon respondent's parental rights.[44] Although all fifty states have laws granting grandparents—and in some cases other third parties—visitation rights under varying circumstances, the Court found the Washington statute "breathtakingly broad."[45] In fact, it is astonishing that the Washington legislature passed a statute with such language in it, given that any person could petition for visitation without even a cursory showing of a relationship with the child. The Court was concerned that once a visitation petition is filed in court, a parent's decision that visitation is not in the child's best interest is given no deference.[46] The judge alone determines what is in the child's best interest. The Court also appeared troubled that the judge injected himself into this dispute without the presence of any special factors justifying the State's interference.

The Court addressed several factors that if present, could justify state interference. For example, petitioners never alleged that respondent was an unfit parent.[47] The Court also noted that respondent never sought to cutoff visitation entirely.[48] However, perhaps most significantly to the Court, the lower court gave no special weight to the respondent's determination of her children's best interests. It noted that "it appears that the Superior Court applied exactly the opposite presumption."[49] In fact, the Court cited the superior court judge's explanation at the conclusion of closing arguments:

> The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend some quality time with the grandparent, unless the grandparent, [sic] there are some issues or problems wherein the grandparents, their lifestyles are going to impact adversely upon the children. This certainly isn't the case here from what I can tell.[50]

The Court found that the judge's comments suggested that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely."[51]

The Court disagreed, finding that the rationale employed by the superior court judge "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child,"[52] and failed to provide any protection for respondent's fundamental constitutional right to make decisions con-

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43. *Id.*

44. *Id*. at 2063.

45. *Id*. at 2061.

46. *Id.* Section 26.10.160(3) of the Revised Code of Washington does not require a court accord a parent's decision any presumption of validity or any weight whatsoever. *Id*.

47. *Id*. At no time did the petitioners allege that respondent was an unfit parent. The Court found that important, because there is a presumption that fit parents act in the best interests of their children, citing *Parham*:

> [O]ur constitutional system long ago rejected any notion that a child is a mere creature of the State and, on the contrary asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. (citing Parham v. J.R., 442 U.S. 584, 602) (alteration in original) (internal quotation marks and citations omitted).

48. *Id*. at 2062. Significantly, many other states expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party. *Id.* at 2063. *See, e.g.*, MISS. CODE ANN. § 93-16-3(2)(a) (1994) (stating that the court must find that "the parent or custodian of the child unreasonably denied the grandparent visitation with the child"); ORE. REV. STAT. § 109.121(1)(a)(B) (1997) (stating that the court may award visitation if the "custodian of the child has denied the grandparent reasonable opportunity to visit the child"); R.I. GEN. LAWS § 15-5-24.3(a)(2)(iii)-(iv) (Supp. 1999) (stating that the court must find that parents prevented grandparent from visiting grandchild and that "there is no other way the petitioner is able to visit his or her grandchild without court intervention").

49. *Troxel*, 120 S. Ct. at 2062.

50. *Id*. (citing Verbatim Report of Proceedings, *In re Troxel*, No. 93-3-00650-7, at 213 (Wash. Super. Ct., Dec. 14, 19, 1994)).

51. *Id*. The judge also stated: "I think [visitation with the petitioners] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children." *Id.* at 214.

52. *Id*.

cerning the rearing of her children.[53] The Court found that, at the very least, if a fit parent's decision regarding who should visit with his children, and for how long that visit should be, becomes subject to judicial review, a court must accord some special weight to the parent's own determination.[54]

The Supreme Court found that this case boiled down to "nothing more than a simple disagreement between the Washington Superior Court and [respondent] concerning her children's best interests."[55] The Court rejected the lower court's involvement in the determination, stating that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made."[56] As the visitation statute required nothing more, the Court held that it was, as applied in this case, unconstitutional.[57]

Because the Supreme Court based its decision on the overbroad nature of the statute, it did not consider "the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."[58] The Court's reluctance to venture into this area is one of the most important aspects of the decision. Given that most family law adjudications are made on a case-by-case basis, the Court was "reluctant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter.[59] This point was also noticed by several of the lobbying groups following the case. Petitioners' attorney said that "it was important that the high court did not adopt the 'harm requirement' cited by the Washington Supreme Court but left intact the 'best interests of the child' standard that is part of the visitation law in forty-seven states."[60]

This is a valuable lesson for legal assistance attorneys. Although the *Troxel* decision generated a great deal of publicity for family visitation issues, its focus on the broad language of the statute doesn't appear likely to affect other, more narrow, state visitation laws. Courts may interpret this decision as allowing or ordering them to give more deference to parental decisions in the absence of a showing of unfitness. All this really does is create a higher burden of proof for third parties seeking visitation rights. And that may not be such a bad thing. Allowing any person to petition the court for visitation, regardless of their relationship to the child, and having their request be treated the same as the parent's opinion, is an unworkable idea. Major Boehman.

Can You Reduce Your Taxes while Having Fun?

Major Fete arrives at the installation tax center with a bulging shoebox of receipts and papers. He asks if he can deduct his costs of having "fun" at various military functions such as hail and farewells, dining-ins, and the like. Can service members deduct their costs for meals, transportation, and baby-sitters from their income for tax purposes? Yes, some of these costs qualify as business expenses and can be part of a taxpayer's itemized deductions. Service members frequently pose such questions to tax center personnel. Fortunately, various resources are available for attorneys to review before counseling clients about business deductions.[61]

The Law Supporting the Deductions

The Internal Revenue Code (IRC) allows a taxpayer to deduct ordinary, necessary, and reasonable expenses directly related to the taxpayer's trade or business.[62] For service mem-

53. *Id*. (citing CAL. FAM. CODE ANN. § 3104(e) (West 1994) (stating that there is a rebuttable presumption that grandparent visitation is not in child's best interest if parents agree that visitation rights should not be granted)); ME. REV. STAT. ANN., tit. 19A, § 1803(3) (1998) (stating that a court may award grandparent visitation if in best interest of child and "would not significantly interfere with any parent-child relationship or with parent's rightful authority over the child"); MINN. STAT. § 257.022(2)(a)(2) (1998) (stating that the court may award grandparent visitation if in best interest of child and "such visitation would not interfere with the parent-child relationship"); NEB. REV. STAT. § 43–1802(2) (1998) (stating that the court must find "by clear and convincing evidence" that grandparent visitation "will not adversely interfere with the parent-child relationship"); R.I. GEN LAWS § 15–5–24.3(a)(2)(v) (Supp. 1999) (stating that the grandparent must rebut, by clear and convincing evidence, presumption that parent's decision to refuse visitation was reasonable); UTAH CODE ANN. § 30–5–2(2)(e) (1998) (same); Hoff v. Berg, 595 N.W.2d 285, 291-92 (N.D. 1999) (holding the North Dakota grandparent visitation statute unconstitutional because the State has no "compelling interest in presuming visitation rights of grandparents to an unmarried minor are in the child's best interests and forcing parents to accede to court-ordered grandparental visitation unless the parents are first able to prove such visitation is not in the best interests of their minor child").

54. *Id*.

55. *Id*. at 2063.

56. *Id*. at 2064.

57. *Id*.

58. *Id*.

59. *Id*.

60. *Court Limits Visitation Rights of Grandparents*, WASH. POST, June 6, 2000, at AO1.

bers, "ordinary" business expenses are the customary or usual expenses incurred in service or performance of duties.[63] The expense is "necessary" if it is appropriate or helpful to the member's service.[64] The IRC provides additional guidance for business expenses linked with entertainment. Entertainment expenses must be "directly related to" or "associated with" the service member's military activities.[65]

Practical Application

Whether a cost qualifies as a business deduction depends on the circumstances surrounding the expense. Did the service member incur the expense as part of a business activity or as part of a social activity? For example, a formal military dinner[66] can be a business activity; while a company or a unit baseball game is a social activity. Because a dinner is a business activity, the service member can deduct some of the associated costs. Other business activities may include lunches or after-duty drinks at the officers club. For example, if a superior intends to improve morale, or to develop subordinates, he can deduct the cost of paying for lunches or drinks at the end of the duty-day for subordinates.[67] Members can also deduct reasonable costs associated with a company picnic or outing.[68] However, when an activity's nature is more social than business, say a private party with many civilian guests, a service member cannot consider the expenses as business related. To illustrate this point, consider officer or non-commissioned officer club dues. Members cannot deduct club dues because club activities are not limited to official functions.[69] Service members can use the club for various social purposes and usually members who are not part of the club can participate in official functions.[70]

Limits

In addition to the "social nature" limitation, the IRC contains other restrictions on business deductions. Service members can deduct all business costs associated with transportation, but generally only fifty-percent of entertainment and meal expenses.[71] Baby-sitter costs are personal expenses and cannot be deducted as ordinary and necessary business expenses. However, childcare expenses could be taken as a nonrefundable tax credit in very limited circumstances.[72]

A two-percent threshold for business deductions creates an additional hurdle.[73] A taxpayer can only deduct expenses exceeding two percent of his adjusted gross income. The various limits are evident when filling out tax forms. First, business expenses are entered onto Internal Revenue Service (IRS) Form

61. *See* Colonel Malcolm H. Squires, Jr. & Lieutenant Colonel Linda K. Webster, *Business Entertainment Expense Deductions by Service Members*, ARMY LAW., Dec. 1996, at 13 (presenting regulatory guidance, applicable tests, and examples of application of business deductions to entertainment expenses); Major Vance M. Forrester, *Deducting Employee Business Expenses*, 132 MIL. L. REV. 289 (1991) (discussing application of business deductions to travel expenses away from home, local transportation expenses, meal and entertainment expenses, and miscellaneous expenses). The Research Institute of America provides many informative articles on tax issues. Research Institute of America, Inc., *Entertainment Expenses—Overview*, RIA USTR INCOME TAXES P1624.054 (2000). Finally, the JAGCNet has various resources such as the Third Tax Law for Attorneys Deskbook available at <http://www.jagcnet.army.mil/jagcnet/lalaw1.nsf>.

62. I.R.C. § 162(a) (LEXIS 2000). If the member is reimbursed for a service-related cost, the cost is not an expense for the member.

63. *See* Forrester, *supra* note 61, at 290 (discussing "ordinary" expenses).

64. *See id.* (discussing "necessary" expenses).

65. I.R.C. § 274. *See* Squires & Webster, *supra* note 61, at 15; Forrester, *supra* note 61, at 298-99 (discussing satisfaction of the "directly related" test for I.R.C. § 274). *See* Squires & Webster, *supra* note 61, at 16; Forrester, *supra* note 61, at 299 (discussing satisfaction of the "associated with" test).

66. Formal military dinners include dining-ins, dining-outs, change-of-command dinners, hail and farewell dinners, and the like. *See generally* Squires & Webster, *supra* note 61.

67. *See id* at 16-20.

68. *Id.* at 16-17 (discussing these types of entertainment).

69. Rev. Rul. 55-250, 1955-1 C.B. 270.

70. Squires & Webster, *supra* note 61, at 17.

71. I.R.C. § 274 (LEXIS 2000). For a discussion of the 50% Limitation Rule, see CCH, 2000 U.S. MASTER TAX GUIDE 265-68 (1999).

72. I.R.C. § 21. The childcare expenses must be work related to qualify for the credit. Expenses are considered work related only if they allow the taxpayer (and spouse if married) to work and are for a qualifying person's care. *Id*. Expenses are not work related merely because a person incurred them while working. The expenses must have been necessary to enable the person to be gainfully employed. For example, a person is not gainfully employed if he provides free labor or volunteers to work for a nominal salary. I.R.C. § 21(b)(2). Whether childcare expenses allow the client to work depends on the facts. For example, the cost of a baby-sitter while a client goes out to eat is not normally work-related expense. I.R.S. Pub. 503, at 7.

73. I.R.C. § 67(a). Business expenses fall into the Internal Revenue Code's "miscellaneous deductions" category. *See* CCH, 2000 U.S. MASTER TAX GUIDE, *supra* note 71, at 297-98.

2106, which differentiates between transportation and entertainment/meal expenses. Figures from IRS Form 2106 are carried over to the "miscellaneous deduction" section of Schedule A (Itemized Deductions). Thus, only members who itemize their deductions can deduct business costs associated with having fun. For those members who do itemize, they must substantiate their business expenses. The few courts who addressed military business deductions clearly indicated a need for substantiating expenses and justifying the necessity or relationship of the activity to service participation.[74]

Conclusion

In summary, the attorney has good news for Major Fete. Major Fete can deduct some of his costs incurred during military activities. However, there is no free party. The IRC imposes restrictions on business deductions. Service members must incur business expenses for activities that were "necessary and ordinary" for military service or performance of duties. Only fifty-percent of the cost of meals and entertainment can be deducted. Major Fete probably cannot deduct his baby-sitter cost as a tax credit, depending on the facts. Finally, miscellaneous deductions are subject to a two-percent threshold. So unless Major Fete has numerous deductions, he may find the photos of the parties are the most worthwhile items in his shoebox of papers. MAJ Vivian Shafer.[75]

International and Operational Law Note

A Picture is Worth a Thousand Words, Especially When Time is of the Essence

Graphical Aides to Rules of Engagement Development and Briefing

During the planning of military operations, judge advocates (JAs) will invariably be called upon to analyze mission rules of engagement (ROE) and disseminate the essential aspects of that ROE to the battle staff. Because of the time sensitive nature of this process, and the critical need to ensure that all members of the battle staff share a common understanding of the ROE (sometimes referred to as "cross-walking" the ROE), developing a tool to graphically portray key elements is valuable. As a result, this note offers a graphical representation of ROE information to aid JAs in rapid ROE analysis and briefing during the mission planning process. A key part of that planning process is course of action (COA) creation and analysis; thus, a corresponding matrix for COA development is also included. Examples of these matrices are found at Annex A and B, respectively.

The U.S. military's contingency forces must be prepared to respond to emergency situations around the world on a moment's notice, and to execute a mission within hours of receipt from the National Command Authority (NCA) or a commander in chief (CINC). Consequently, the timing of the staff planning process for these organizations is substantially compressed. Each staff member must analyze and present critical information completely, yet concisely, in the most timely manner. This includes, of course, the JA, whose primary concern in the initial staff planning process will almost always include ROE analysis and development.

The proposed matrix—referred to in this note as the briefing matrix—is based on the premise that ROE understanding and analysis might be enhanced, or at least expedited, by focusing on major battlefield functions, and how ROE impacts those functions. As a result, the proposed briefing matrix lists functional areas of force application along the top, and ROE categories along the left side. During a rapid planning process brief, staff officers can locate their particular functional area and quickly read down the column. They can then understand where they are, where they might want to go, and how to get there. Note, however, that the existence of a "block" on the matrix does not require that the block be filled in. In practice, the mission ROE will likely include portions applicable to some force components, yet not others. However, the matrix does provide the JA and the staff the opportunity to identify what might be necessary additions or modifications to the ROE.

The second matrix is offered as a tool to aid JAs in evaluating proposed COA, an integral element to the mission planning process. This matrix—referred to in this note as the COA matrix—assists JAs in determining the ROE supportibility of the specified and implied tasks of major battlefield functions. It is an analytical tool for use in working with other staff members to develop and evaluate COA.

The matrices are intended as tools into which JAs, both Army and Marine Corps, can insert their judgements.[76] However, with modification, they are useful for any service. This note uses the Marine Corps Planning Process system as an example.

The first COA step is the mission analysis. Upon receipt of the mission order from higher headquarters, the commander

74. *See generally* Forrester, *supra* note 61, at 302-03 (discussing the substantiation requirement established through case law); Squires & Webster, *supra* note 61, at 18.

75. Student, 48th Graduate Course.

76. The Marine Corps Planning Process and the Army Military Decision Making Process–both of which are the basis for rapid mission planning–are essentially the same. The Marine Corps Planning Process consists of the following six steps: (1) Mission Analysis; (2) COA Development; (3) COA War Game; (4) COA Comparison/Decision; (5) Orders Development; (6) Transition. The Army Military Decision Making Process consists of the following seven steps: (1) Receipt of Mission; (2) Mission Analysis; (3) COA Development; (4) COA Analysis (War Game); (5) COA Comparison; (6) COA Approval; (7) Orders Production. A detailed description of each of these planning models, and the applicability of ROE to each individual step, may be found in the Center for Law and Military Operations, *Rule of Engagement (ROE) Handbook for Judge Advocates* (1 May 2000).

and staff must analyze the mission requirements and parameters. The briefing matrix provides a convenient tool to organize the ROE related information in the mission order, and to communicate that information to the staff in one comprehensive snapshot during the three to five minutes normally allotted at the initial meeting.

Upon the commander's approval of a COA, the final mission plan must be developed and briefed. This takes place in the transition step for the Marine Corps, or for the Army in the orders production phase. Each staff member and subordinate commander must understand his part, as well as the parts of all others.

Between the first step, mission analysis, and the final step, transition (or orders production phase), are the various creative and analytical COA steps. The COA matrix is designed to enable the JA to evaluate proposed COA for ROE supportability. It is not intended as a briefing tool, but rather a graphical organization of the JA's analysis. It lists along the top, or X-axis, authorizations for various force applications, like indirect fire, close air support or riot control agents. Analysis of the COA would render specified and implied tasks for these force applications which would be designated along the left side, or Y-axis (refer to Annex B for a sample COA matrix).

A simple "go" or "no go" would be entered into the box to signify ROE supportibility. To illustrate, assume a specified task for a hypothetical mission is suppression of enemy air defense (SEAD). An implied task would then be use of artillery fires in support of this SEAD mission. If the existing ROE restricts the use of unobserved indirect fires, the JA would enter "no go" in the box corresponding to that implied task for indirect fire. The JA would then discuss this restriction with the battle staff and commander, who must ultimately decide whether the inability to employ unobserved indirect fires renders the SEAD mission impossible to execute. A "go" or "no go" would then be entered for the specified task.

This matrix provides the JA a tool to organize and display judgments as to the ROE supportability of each specified and implied task. A synthesis of the displayed information leads to final conclusions and recommendations as to the ROE supportibility of the COA as a whole. This in turn prompts the commander to either seek modification to the ROE, or modify the specified or implied task.

The briefing matrix consists of two axes. Along the top, or X-axis, are the force application functions. These functions are broadly grouped into general categories of force application, and further subdivided into more specific combat and staff functions. They are intended to cover the range of possible combat functions that might be impacted by ROE, and therefore include the following:

- Maneuver:
  - •Infantry (IN)
  - •Armor (AR)
  - •Anti-Tank (AT)
- Fire Support:
  - •Artillery (ART)
  - •Mortars (MRT)
  - •Naval Gunfire Support (NGS)
- Air:
  - •Close Air Support (CAS)
  - •Attack Aviation (rotary) (ATT)
  - •Air Superiority (Battlefield Air Interdiction) (AS)
  - •Air Defense (AD)
- Mobility/Counter-Mobility:
  - •Engineer (EN)
  - •Chemical (CHEM)
  - •Civilian Population Control (CPC)
- Intelligence:
  - •Electronic Warfare (EW)
  - •Information Warfare (IW)

Along the left side, or Y-axis, is a spectrum of ROE categories applicable to the combat functions. The matrix is designed to be read from top to bottom, conveying to the operators their permission and restrictions, how to modify them, and what existing measures, in the judgment of the JA, are fundamentally inconsistent with the existing mission, and therefore jeopardize the ability of the force to accomplish the mission (such as the inability to conduct unobserved indirect fires in support of a SEAD mission, which might be an essential aspect of setting the conditions for an air assault operation). If the JA believed that this authority would not be granted from higher headquarters, this issue would be "red flagged" as a potential showstopper.

The first row shows existing permission, or what the operator can do, and always includes self-defense. Based on the explicitly permissive nature of the most recent version of the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement (SROE),[77] published in January 2000, commanders should presume that any authority not restricted is permitted. Nonetheless, this row might be useful to reiterate important permissions, or to identify explicitly granted permissions. Most importantly, this row always highlights the inherent right of self-defense. The second row shows existing restraints, or limitations on force application authority.

The next three rows along the Y-axis provide the operator with an easy view of how to "get more." Anticipated requirements would show weapons, targets or materials that would be necessary or useful to the mission, but are not presently permitted. Approval level indicates how high up the chain of command a request must go to for grant of such an authority.

77. Chairman, Joint Chiefs of Staff Instr. 3121.01A, Standing Rules of Engagement (15 Jan. 2000) [hereinafter CJCS Instr. 3121.01A].

Anticipated rationale would summarize why that anticipated requirement is needed.

The sixth row provides an opportunity for the task force commander to highlight any limitation on existing ROE he chooses to impose, placing limits on subordinate commanders, such as requiring approval of the task force commander before use of RCA, even though the authority for such use may have been granted unconditionally by the CINC. This should reemphasize that commanders at every level may always limit force application authority they have been granted by higher levels.

Finally, the seventh row, or red zone, identifies any ROE issue fundamentally inconsistent with the existing mission, and therefore placing the ability of the force to accomplish the mission in jeopardy.

In the blocks formed from the columns of force application and the rows of ROE categories, JAs would input their interpretation of the ROE. For instance, under existing restraints for electronic warfare (EW), cross border jamming might be listed if the mission from higher headquarters so dictated. The JAs might then list cross border jamming as an anticipated requirement, after discussing deep air targets with the air officers. The level to which this request would have to go would be listed, as well as the deep air targets as a rationale. The task force commander might choose to restrict the jamming of certain civilian frequencies without his express authorization. This would be shown in the sixth row. Finally, if JAs felt that jamming frequencies used by local emergency response and hospital teams would violate the rules of war, they might list that in the final, red zone row.

Upon completing the matrix for all force application areas, JAs can reproduce it and project it at the staff meeting, touching upon important points or highlights verbally. The bulk of the information is transferred to the audience graphically by the matrix. Additional planning and briefing will be required as the mission evolves. The information input into the matrix can be color-coded to indicate a change in status. For instance, changes might be printed in red, issues remaining the same in green and new issues in blue.

There are three distinct advantages to the briefing matrix. Foremost, it provides a snapshot telling the operators what they can and cannot do regarding the ROE. The graphical presentation of this information allows the operators to digest it more quickly and more thoroughly than an oral or written recitation. It also provides JAs a vehicle to cogently present the information.

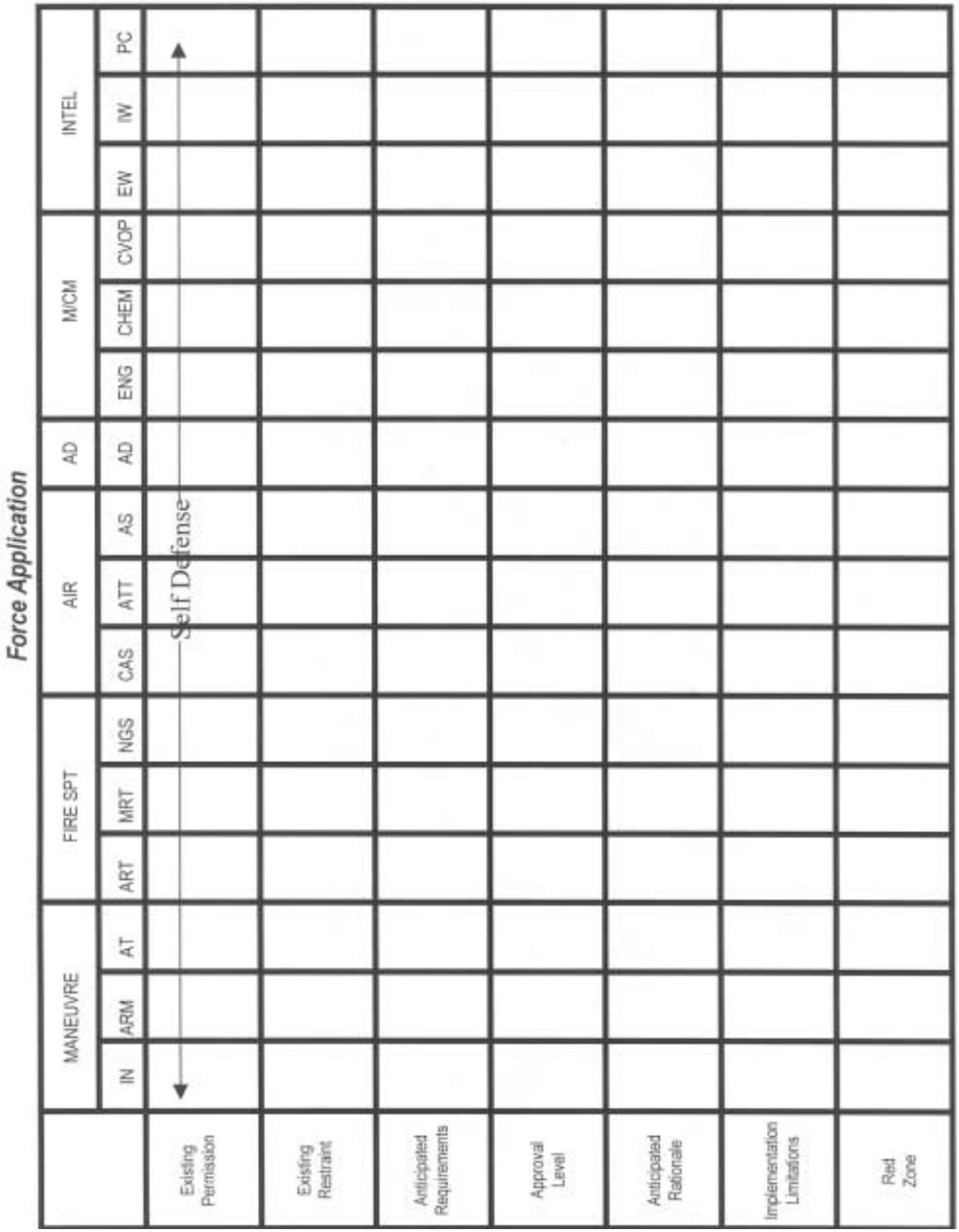
Another advantage is that the briefing matrix allows staff members to understand the ROE issues of functional areas other than their own. This cross-functional awareness enables staff members to work symbiotically. By understanding not only their own capabilities and limitations, but also those of other functional areas, staff officers can incorporate their colleague's restrictions and permission into their own plans. For instance, the air defense officer must fully appreciate the limits on fire support regarding unobserved indirect fire, in order to plan suppression of enemy air defense (SEAD) missions. The air officers must understand the limits on SEAD without effective fire suppression, and the maneuver officers must understand the limitations of air without SEAD.

The final advantage is that the briefing matrix provides a clear, systematic, analytical planning tool for JAs. Simply by completing the matrix in preparation for briefing, JAs are forced to contemplate the myriad issues that arise for each functional group, and organize their thoughts accordingly.

The proposed matrices are, of course, only models. Judge advocates may want to change them to suit the needs of their task force or their mission, as well as their personal tastes. The key point is that a systematic approach to ROE analysis, and a graphical presentation of ROE issues, are excellent methods for JAs to analyze and brief ROE in the demanding atmosphere of the deployed unit. The proposed matrices can be important tools in these efforts. Major Corn and Major Harper, USMC.

Annex A

ROE Briefing Matrix



Annex B

COA Matrix

COA ___	Authority for Direct Fire	Authority for Indirect Fire	Authority for CAS	Authority for Deep Ops	Authority for RCA	Authority for EW	Authority for SEAD
Specified							
1. ___							
2. ___							
3. ___							
Implied							
1. ___							
2. ___							
3. ___							
4. ___							
5. ___							